No. 353

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1948

HAROLD CHRISTOFFEL and ALLIS-CHALMERS WORKERS UNION, Local No. 248, UNITED AUTOMOBILE WORKERS OF AMERICA, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

v.

THE WISCONSIN EMPLOYMENT RELATIONS BOARD and NICHOLAS IMP and MICHAEL BOHACHEF,

Respondents.

BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS BOARD, OPPOSING GRANT OF WRIT OF CERTIORARI

JOHN E. MARTIN,
Attorney General,

JAMES WARD RECTOR,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.

Trade Press Publishing Company, Milwaukee, Wisconsin—10-2-48—50 copies

INDEX AND SYNOPSIS OF ARGUMENT

	Page
DECISION OF COURT BELOW	1
NATURE OF CASE	1
FACTS	2
ARGUMENT	4
I. QUESTIONS PRESENTED BY PETITIONERS NOT HERE INVOLVED	4
II. THE JUDGMENT HERE INVOLVED PRESENTS NO SUBSTANTIAL QUESTIONS WHICH HAVE NOT HERETOFORE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES	9
CONCLUSION	13

CASES CITED

Allen-Bradley Local 1111 v. Wisconsin E. R. Board, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 ..... 10, 12

American Colum & Lumber Co. v. U. S., (1921) 257 U. S. 377, 42 S. Ct. 114, 66 L. ed. 284, 21 A. L. R. 1093 12

Christoffel v. Wisconsin E. R. Board, (1943) 243 Wis. 332, 10 N. W. 2d 197 ..... 1, 2-3, 8-9, 12

Duplex Printing Press Co. v. Deering, (1921) 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349 12

Gompers v. Bucks Stove & Range Co., (1911) 221 U. S. 418, 31 S. Ct. 492, 55 L. ed. 797 12

Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1942) 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946 ..... 8, 10

Page

Milk, etc. Union, et al v. W. E. R. B., et al, (1942) 316 U. S. 668, 62 S. Ct. 1035 11

National Labor R. Board v. Electric Vacuum C. Co., (1942) 315 U. S. 685, 62 S. Ct. 846, 86 L. ed. 795 .....6, 7, 11

N. L. R. B. v. Indiana & Michigan Electric Co., et al, #73 (Jan. 18, 1943) 63 S. Ct. (Adv.) 394, 317 U. S. (No. 1) IV 5

National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893, 108 A. L. R. 1352 6

N. L. R. B. v. Sterling Electric Motors, (C. C. A. 1940) 109 F. 2d 194, aff'd (1940) 114 F. 2d 738 5

N. L. R. B. v. Virginia Electric & Power Co., (1941) 314 U. S. 469, 62 S. Ct. 344, 86 L. ed. 306 10-11

Truax v. Corrigan, (1921) 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124 12

Virginia Ry. Co. v. System Federation No. 40, (1937) 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592 5-6

STATUTE INVOLVED

Federal Statutes

29 U. S. C., sec. 151 5

157 ..... 4, 5

Wisconsin Statutes

Ch. 111 4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1943

HAROLD CHRISTOFFEL and ALLIS-CHALMERS WORKERS UNION, Local No. 248, UNITED AUTOMOBILE WORKERS OF AMERICA, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

v.

THE WISCONSIN EMPLOYMENT RELATIONS BOARD and NICHOLAS IMP and MICHAEL BOHACHEF,

Respondents.

BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS BOARD, OPPOSING GRANT OF WRIT OF CERTIORARI

DECISION OF COURT BELOW

The petition for writ of certiorari seeks review of a decision of the Supreme Court of the State of Wisconsin, 243 Wis. 332, 10 N. W. 2d 197, rendered June 16, 1943.

NATURE OF CASE

The decision affirmed a judgment of the Circuit Court for Milwaukee County confirming and enforcing an order of the Wisconsin Employment Relations Board. The board's order was based on findings that the petitioning union and its president had committed unfair labor prac-

tices under the Wisconsin Employment Peace Act in having:

(a) coerced and intimidated certain employees of the Allis-Chalmers Manufacturing Company in the enjoyment of their legal right to freely select collective bargaining representatives of their own choosing or to refrain from any or all concerted activities for the purpose of collective bargaining;

(b) attempted to induce the employer by the discharge or discipline of such employees to interfere with their right to select bargaining representatives free from interference.

The order, in effect, directed the discontinuance of such practices, and the posting of notices informing employees of the existence of the rights found to have been violated and of the intent of the union to refrain from interference with such rights by coercion or intimidation.

The exact provisions of the findings and order are set out in the decision of the Supreme Court of Wisconsin (10 N. W. 2d 201, 203, 243 Wis. 342-343, 347-348).

FACTS

The petitioners' brief contains a number of assertions purporting to be statements of facts which do not accord with the findings of the Wisconsin Employment Relations Board, but which represent rather the petitioners' contentions made at the time of hearing. For example, although the board affirmatively found that physical violence and threats of physical violence were exercised by the union upon certain employees to coerce them into payment of union dues, the petitioners' brief at page 19 refers to one of the matters so found as "what is claimed to have been an assault" and follows with the statement that "the real substance of the matter is * * *."

The decision of the Supreme Court of Wisconsin expressly held that:

> "Perusal of the record of the proceedings before the board shows that they" [the findings] "are all amply sustained. These findings are made conclusive by the act if sustained by credible and competent evidence."

Neither the petition for certiorari nor its supporting brief has assigned error in respect to the foregoing holding.

Furthermore, although findings of fact could not be set aside on the ground that there was no evidence to sustain them unless the entire record were available, the petitioners have not filed (as required by Rule 38, Paragraph 1) "a certified transcript of the record in the case" which was before the Supreme Court of Wisconsin when it made its ruling on the findings. The petitioners, as a matter of fact, have not even supplied this court with all of that portion of the record which was "printed for the use of the court below," as provided by Rule 38, Paragraph 7 relating to the printing of the record. Because of the omissions and inaccuracies in the same printed abridgment of the record as is now before this court, it was necessary to print for the use of the court below a supplement covering portions of the omitted evidence. That supplement is not included in the printed abridgment filed with the petition for certiorari.

While the respondent Wisconsin Employment Relations Board has no reluctance to meet the issue whether the findings are supported by evidence, that issue has not been raised by the petition for certiorari, and the record upon which the findings are based has not been filed. Under those circumstances, any statements of fact which conflict with the findings are irrelevant and must be disregarded.

The salient facts as found are: The union and its officers carried out a persistent and militant campaign to compel the respondents, Michael Bohachef and Nicholas Imp, to

join the union. These two employees, incidentally, expressed their personal preferences by joining a different labor organization (R. 153, 196; Abridg. 152, 158). The campaign of the union was characterized by such efforts at compulsion as threats of bodily harm, physical assault, threats of loss of jobs, and false accusation of criminal offenses. The campaign also included efforts to induce the employer to discharge or discipline these two employees, upon threat of a general strike. The culmination of the campaign was a bitter strike of far-reaching effect, in which the demand for discharge of these two employees was the chief issue.

During this campaign, the union and the employer had no closed-shop nor union-shop contract, nor does the record indicate that any demand or request for such a contract was made of the employer until some time *after* the demand for the discharge of Bohachef and Imp, and *after* all the other acts upon which the findings were based.

ARGUMENT

I. QUESTIONS PRESENTED BY PETITIONERS NOT HERE INVOLVED

None of the three questions defined on page 8 of the petitioners' brief is involved in this case.

(1) Neither does the Wisconsin Employment Peace Act (Ch. 111, Wis. Stats.) "create" a new right to abstain from all the concerted activities described in sec. 7 of the National Labor Relations Act (49 Stat. 452, c 372 § 7, 29 U. S. C., § 157), since that right, as well as the right to engage in such activities, existed independently of statute; nor is the right to *abstain* from concerted activities inconsistent with the right to *engage* in such activities. The petitioners seek to interpret sec. 7 of the National Labor Relations Act as if it created an *obligation* to

engage in concerted activity. It has not been so construed. This court has recognized that the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 151 *et seq.*) seeks to safeguard full freedom of choice on the part of the employee. Freedom to refrain from participation in labor activity has been recognized as inherent in full freedom of choice, regardless of whether words to that effect are expressed.

For example, this court said in *N. L. R. B. v. Indiana & Michigan Electric Co., et al.*, #73 (January 18, 1943) 63 S. Ct. (Adv.) 394, 400-401, 317 U. S. (No. 1) IV:

> "Their" [the union's] "proposition to the Company that it cause the men to join Local B-9 was a proposal to violate the National Labor Relations Act, whose purpose is to protect the workmen from employer pressure *and leave them free to choose for themselves whether*, and with whom, *they will associate.*" (Emphasis supplied.)

In *N. L. R. B. v. Sterling Electric Motors*, (C. C. A. 1940) 109 F. 2d 194, 202, affirmed, 1940, 114 F. (2d) 738, it was expressly stated that sec. 7 of the National Labor Relations Act protects not only the rights to associate with an existing union or to assist in organizing a new association, but also to refrain from joining, creating or assisting any labor organizations. The court said, in part:

> "* * * What we have described above regarding the result of 'normal relations and innocent communications' between employers and employees properly may lead the latter to choose to remain unorganized. * * *
>
> "Each of these three rights is of equal value and in administering the National Labor Relations Act is entitled to the protection of the board."

The court in the foregoing decision based its ruling on the analogy of the holdings of this court in *Virginia Ry.*

Co. v. System Federation No. 40, (1937) 300 U. S. 515, 557, 81 L. ed. 789, 57 S. Ct. 592, 604, and *National Labor Relations Bd. v. Jones & Laughlin S. Corp.,* (1937) 301 U. S. 1, 45, 57 S. Ct. 615, 81 L. ed. 893, 108 A. L. R. 1352. Those cases held that the obligation of the employer to deal with the chosen representative of the employees imposed also the obligation to deal with no other, thus protecting the employees' right to refrain from selection as well as to make a selection.

In the instant case, it is not the employees' right with respect to selection of a representative which is involved, since the right of the union to bargain for the employees was conceded and recognized. It is the right of the employee to decide freely whether he shall join the union. That right exists even though the status of the union as bargaining representative has been established, and even though there may be some question as to the revocability of its selection as such representative during a fixed period.

It was pointed out in *National Labor R. Board v. Electric Vacuum C. Co.,* (1942) 315 U. S. 685, 691, 62 S. Ct. 846, 849, 86 L. ed. 795, that:

> "Assuming that every old employee furnished a power of representation for collective bargaining not revocable during the year, it need not be inferred the employee also was bound thereby not to switch his union allegiance."

(2) The question whether the state may limit efforts of a labor organization to obtain a closed shop is not in issue here.

Nothing in the order of the board or the affirming judgment seeks to prevent, nor even relates to, a demand for a closed shop. The gist of the order is directed to preventing intimidation of individual employees and preventing attempts to induce the employer to coerce individual employees, *in the absence of a closed shop.* It has been found and is conceded that there was no closed shop

contract between the union and the employer in this case. Neither do the unfair labor practices involved arise either out of, or in connection with, a demand for a closed shop contract. No such demand was made by the union until well *after* the culmination of its campaign to compel the two employees, Imp and Bohachef, to join its ranks and *after* demands for their discharge or discipline had been made of the employer upon threat of strike.

Neither the board nor the courts of Wisconsin decided nor were requested to decide whether, under the circumstances, it would have been lawful for the union to demand a closed shop contract, as a result of which Imp and Bohachef, *as well as all other employees*, would have been given the choice of joining the union or forfeiting their employment. What the state courts would have decided had such a question been submitted cannot yet be known. Until that question is presented and decided by the state courts, it cannot be submitted for review.

The petitioners have apparently adopted the theory that the demand by a duly selected bargaining representative that an employer coerce specified employees into joining a union is indistinguishable from a demand for a union shop. That theory was squarely rejected by this court in *National Labor R. Board v. Electric Vacuum C. Co.*, (1942) 315 U. S. 685, 62 S. Ct. 846, 86 L. ed. 795; where the court defined the issue as:

> "The basic question for determination by this review is the right of the respondent employer * * * to cooperate with unions, representing an uncoerced majority of its employees, to secure new membership. The right is challenged because exercised *prior* to a closed shop agreement." (Emphasis supplied) (Loc. cit. 315 U. S. 687, 62 S. Ct. 847)

The right of an employer to assist a union to obtain or hold members, prior to the execution of a closed shop contract, was there unequivocally denied, even though the

union had unquestioned status as the exclusive bargaining representative of the majority. Such action by the employer would be an unfair labor practice under the National Labor Relations Act.

An act of an employer defined as an unfair labor practice by the National Labor Relations Act acquires no immunity because it is performed upon demand of, or under severe pressure by, a union.

(3) This case does not present the question, as stated in petitioners' brief, whether a state may prevent solicitation of membership in a labor organization.

There has been no attempt in this case, either by the state act or the order and judgment issued thereunder, to prevent solicitation of members by a labor union. Presumably, in wording the third "question" the petitioners have reference to the provision of the order in which the term "solicitation" is used. The judgment, however, does not direct the union to cease and desist from solicitation, but only from "attempting to *coerce* or *intimidate* any of the employes of the Allis Chalmers Mfg. Co. * * * by *continuous solicitation* of membership *if objected to*" (Emphasis supplied) (R. 56; Abridg. 142) or by other specific means. The judgment does not prevent any solicitation except such as, by its persistent or over-reaching nature, falls within the terms "coercion" or "intimidation."

As pointed out in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946 the order under review is the order as it has been construed by the Supreme Court of Wisconsin.

The Wisconsin court has construed the portion of the order relating to solicitation of members as follows:

> "* * * As to (1) while no cases have held that the specific acts of continuous solicitations to join the union against objection is an unfair labor practice, the continuous and persistent solicitations of Boha-

chef harassed and hindered him in the enjoyment of his legal right not to join the union. It was done for the purpose of so harassing, annoying and persecuting him as to cause him eventually to join the union against his will rather than endure it. The board might rightly so infer from the evidence. Such solicitations tend to provoke breaches of peace by violence. They destroy the right of the persecuted employee to pursue his work in peace, and frustrate the declared purpose of the act to promote 'industrial peace,' sec. 111.04 (2) Stats., and peaceful relations between employees as well as between employer and employees." (Loc. cit. 10 N. W. (2d) 204, 243 Wis. 332)

II. THE JUDGMENT HERE INVOLVED PRESENTS NO SUBSTANTIAL QUESTIONS WHICH HAVE NOT HERETOFORE BEEN PASSED UPON BY THE SUPREME COURT OF THE UNITED STATES

The broadest possible statement of the issue upon the petition for certiorari is whether the judgment requiring the union to cease and desist from the following activities violates any right guaranteed by the constitution or any statute of the United States:

> "(1) A. Attempting to coerce or intimidate any of the employees of the Allis-Chalmers Manufacturing Company, including Michael Bohachef and Nicholas Imp, or either of them, either by continuous solicitation of membership if objected to, or by assaults, or by threats of bodily harm or of loss of their jobs, or by false accusations of the commission of criminal offenses, or by any other manner or in any other way, to enjoy or engage in, or refrain from, any or all of the following rights or activities: To freely select collective bargaining representatives of their own choosing, or to form, join or assist labor organizations,

or to engage in lawful, concerted activities for the purpose of collective bargaining or any other mutual aid or protection.

"(1) B. Attempting in any way or in any manner to coerce, intimidate or induce the Allis-Chalmers Manufacturing Company to interfere with the complainants, Bohachef and Imp, in the enjoyment, or exercise, of their said rights and activities above stated, or their right to refrain from any or all of such activities" (R. 56; Abridg. 142).

A. With respect to the first, the mere assertion that the right to *coerce* or *intimidate* employees by the means described is protected by the constitution or laws of the United States is so manifestly fallacious as to render argument superfluous.

In the cases of *Hotel & R. E. I. Alliance v. Wis. E. R. Board,* (1942) 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946, and *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, this court upheld the validity of orders restraining unions in much broader terms from what the petitioners describe as "organizational activities."

Organizational activities aimed at persuasion rather than intimidation are not forbidden by the order and judgment of which review is sought; neither are activities which involve only the exercise of the right of speech. The board's order was based on a course of conduct which overstepped legitimate bounds into the area of tort, including physical violence and false accusation of commission of criminal offenses. This court has held that the fact that vocal expression has been included in a coercive course of conduct does not render such conduct immune from regulation. The parts of the conduct which involve the use of speech need not be regarded in isolation. It is the "totality of the activities" which are to be considered. *N. L. R. B. v. Virginia Electric & Power Co.,*

(1941) 314 U. S. 469, 477, 62 S. Ct. 344, 348, 349, 86 L. ed. 306.

Obviously, no mere exercise of the right of speech, unaccompanied by overt act or threat, is forbidden by the order or judgment.

B. All that is prohibited by the second portion of the judgment is attempting to induce the employer to commit what would be an unfair labor practice not only under the Wisconsin, but under the federal law.

National Labor R. Board v. Electric Vacuum C. Co., (1942) 315 U. S. 685, 62 S. Ct. 846, 86 L. ed. 795.

The assertion, that state action which tends to prevent a practice condemned by Congress conflicts with the laws of the United States, demonstrates its own absurdity.

The union is not prejudiced nor denied any valuable right by compliance with this provision of the judgment. On the contrary, to violate the provision would be to its distinct disadvantage in the event the employer should yield. If the employer should discharge an employee for lack of union membership, at the union's request, the employer's action would constitute assistance to the union under the rule of *National Labor R. Board v. Electric Vacuum C. Co.*, (1942) 315 U. S. 685, 62 S. Ct. 846, 86 L. ed. 795, and would nullify any closed shop contract which it might subsequently enter with that union.

Concerted activities directed toward the accomplishment of an unlawful object are not protected under any guarantee of the constitution or laws of the United States. That principle was the one involved in *Milk, etc. Union et al v. W. E. R. B. et al.*, (1942) 316 U. S. 668, 62 S. Ct. 1035, in which this court denied certiorari.

The principle has been well established by decisions of this court, among them:

American Colum & Lumber Co. v. U. S., (1921) 257 U. S. 377, 42 S. Ct. 114, 66 L. ed. 284, 21 A. L. R. 1093;

Truax v. Corrigan, (1921) 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124;

Duplex Printing Press Co. v. Deering, (1921) 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349;

Gompers v. Bucks Stove & Range Co., (1911) 221 U. S. 418, 438-439, 31 S. Ct. 492, 55 L. ed. 797.

Under the ruling of this court in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, the fact that the employer is engaged in interstate commerce gives rise to no repugnancy between the order of the Wisconsin Employment Relations Board and the National Labor Relations Act. Here, as there, it is undisputed that the National Labor Relations Board has not undertaken to exercise any jurisdiction it might have over the employer's operations. Here, as there, the judgment involves only employee and union activity which is not governed by the federal act.

The petitioners have assigned as error that the Supreme Court of Wisconsin held that "the acts in question in this case had no relation to interstate commerce." The court's words were that, "The matters comprised in the orders of the board in no way affected commerce." (10 N. W. 2d 199, 243 Wis. 339.) This was no doubt intended in the sense that compliance with the order and judgment would cast no burden upon interstate commerce. Even if it were to be conceded that the court did err in the scope of its statement, the error would be immaterial since the statement is not essential to the result reached. The parties were unquestionably Wisconsin residents, subject to the police power of the state. So long as the order and judgment issued under the

state's police power does not burden interstate commerce, is not otherwise repugnant to the constitution, and does not conflict with the laws of the United States or orders of the National Labor Relations Board issued thereunder, it is immaterial that one of the parties engages in interstate commerce.

CONCLUSION

The petitioners have discussed a number of so-called conflicts between the theory of the National Labor Relations Act and the Wisconsin Employment Peace Act, based upon their own evaluation of isolated terms of the Wisconsin Act. While such theoretical conflicts would not be reviewable even if they existed, since they are not involved in the order and judgment of which review is sought, such malignment of the good faith of the Wisconsin Legislature as appears in petitioners' brief should not go unanswered.

The Wisconsin Legislature has not sought to undermine, but rather to support, the national policies. Both the National Labor Relations Act and the Wisconsin Employment Peace Act are directed to the same purpose of preventing industrial conflict by preventing infringement upon employee freedom of choice in the labor movement. The Wisconsin Act differs from the Federal Act in scope but not in theory. The Wisconsin Legislature has not aimed to curtail any of the guarantees afforded by the Federal Act, but has extended *further* protection of employee freedom. The Wisconsin Act imposes upon the employer the same obligations with respect to collective bargaining as does the Federal Act, and restricts employer interference with concerted activities of employees in almost identical terms. In administration of the act no case can be cited in which the Wisconsin Board has failed to defer to rulings of the National Labor Relations Board when the latter has assumed jurisdiction.

The essence of the argument on which the petitioners seek review is that their activities would not be subject to restriction under the National Labor Relations Act because that act has no application to them. We submit that such circumstance raises no conflict when the activities prevented by the state statute are also contrary to the spirit of the federal law.

JOHN E. MARTIN,
Attorney General,

JAMES WARD RECTOR,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.